IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

P&M CONSTRUCTION, INC.,
Appellant,

v.

SEAN R. MATT and KIMBERLY M. TOSSMAN,
Respondents.

No. 49605-4

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The homeowners have, for the first time in this case, announced what they consider to be legal authority for their award of attorney's fees—the Superior Court's exercise of its inherent power. Although there are numerous Washington cases discussing the substance of the inherent power, none were cited to the trial court and only one such case was cited to this court. With this single citation and a one-sentence explanation of the concept, the homeowners have failed to demonstrate why the inherent power of the Superior Court is even a relevant issue in this case. It is, moreover, with some irony that the principles announced in that one cited case directly support the contractor's position in this appeal. One of these principles is that the court's inherent power is appropriately invoked only in response to a party's "disregard [of] judicial authority."

The Court of Appeals has access to the same record as the Superior Court, and that record does not permit a conclusion that the contractor disregarded judicial authority simply by disregarding the homeowners' demands for formal dismissal that were premature under the terms of the October 21, 2015 accord. The Supreme Court has mandated

that decisions involving accords be reviewed under the same standard as decisions involving summary-judgments. This court should therefore decide, as a matter of law, that the Superior Court erred by awarding attorney's fees to the homeowners.

ARGUMENT

1. THE HOMEOWNERS FAIL TO DEMONSTRATE HOW COMPLIANCE WITH A LOCAL RULE CONSTITUTES DISREGARD OF JUDICIAL AUTHORITY

Until they filed their brief in this appeal, the homeowners had been silent regarding what authority, if any, justified an award of attorney's fees in their favor. They now claim that the Superior Court had authority to make the award in the exercise of its "inherent power." Brief of Respondents 13.

The contractor, for two reasons, did not include in its opening brief any discussion regarding the Superior Court's inherent power: First, the contractor had no notice that this would be a relevant issue. Neither the homeowners nor the Superior Court made any reference to the court's inherent power in any of the proceedings below. Second, the contractor did nothing that would permit a reasonable

person even to suggest that the inherent power of the Superior Court had been triggered. But the contractor did know that the homeowners' failure to cite authority in support of its motion would cause a disruption in the appellate process. The contractor therefore announced in its opening brief that it could not provide a complete argument to this court until after it received the homeowners' brief and discovered what specific pretext they would assert as their legal theory. Brief of Appellant 20. The contractor takes the opportunity of this reply brief to complete its argument, as it is permitted to do under the rules of appellate procedure.

According to the single substantive case cited by the homeowners on this issue, the inherent power of the Superior Court is triggered only "in 'narrowly defined circumstances" where there is "disregard [of] judicial authority" and a need for the court "to protect the judicial branch in the performance of its constitutional duties, when reasonably necessary for the efficient administration of justice." Greenbank Beach and Boat Club, Inc. v. Bunney, 168 Wn. App. 517, 525–27, 280 P.3d 1133, 1138–39 (2012) (quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 764–65, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)).

In the case presently under review the parties agreed to settle their mutual claims. As part of that

agreement, they ratified the procedure set forth in LCR 41(e)(3), which delayed formal dismissal for a period of 45 days. The trial court, as a result of this accord, put the case on hiatus. The homeowners are now claiming, by implication of the single issue raised in their brief, that the contractor disregarded judicial authority by failing to stipulate to a formal dismissal sooner than the 45-day deadline. But the homeowners have failed to link the inaction to any statute, rule, common-law principle, or court order that the contractor might be alleged to have violated. *See, e.g.*, State v. S.H., 102 Wn. App. 468, 470, 8 P.3d 1058, 1059 (2000) (affirming a sanction for inaction where a statute required an alleged juvenile offender to enter into a diversion agreement "as expeditiously as possible"). Moreover, the contractor committed no fraud against either the homeowners or the court, *see, e.g.*, Wilson v. Henkle, 45 Wn. App. 162, 169, 724 P.2d 1069, 1073 (1986) (finding fraud where attorney executed on a court deposit after failing to disclose to a commissioner that the fund was the subject of a contested hearing to be held in two days), and—having no interaction with the court during the hiatus—could not possibly have offended the dignity of the Superior Court by acting in an insolent or insubordinate manner. There was certainly no violation of LCR 41(e)(3) except, arguably, by the

homeowners themselves when they filed a motion to dismiss prior to the deadline set forth in that rule. The homeowners have simply failed to make even a colorable argument that the contractor disregarded judicial authority in any shape, manner, or form after the parties entered into their accord on October 21, 2015.

2. BY SEEKING A REMEDY WITHOUT ANY ENTITLEMENT UNDER THE PLAIN MEANING OF THE ACCORD THE HOMEOWNERS WERE THE ONLY PARTY TO ACT IN BAD FAITH

The Superior Court cannot impose sanctions under its inherent authority unless it makes a finding that the target of the sanctions has acted in bad faith. State v. S.H., 102 Wn. App. at 475, 8 P.3d at 1061. Although "[a] party may demonstrate bad faith by, *inter alia*, delaying or disruption litigation," *id.*, it cannot reasonably be argued that a party delayed or disrupted litigation merely by declining to act in advance of a deadline set by court rule.

The record simply will not permit a finding of bad faith against the contractor. There can be no dispute that the homeowners filed their motion to dismiss and made their request for attorney's fees prematurely—prior to the arrival of the 45-day deadline on December 3, 2015.

The record does, however, support a finding of bad faith against the homeowners. It cannot reasonably be disputed that they filed a premature motion to dismiss, asked for attorney's fees without any entitlement under the plain meaning of their accord, and made that request without citation to legal authority. Insofar as the homeowners had recently surrendered their counterclaims and delivered to the contractor a personal check in the amount of $45,000, it would be reasonable to suggest they were motivated by spite in their request for fees. Spite is simply one particular form of bad faith.

3. A COURT CANNOT USE ITS INHERENT POWER TO CONTRADICT ESTABLISHED LAW ABSENT A SPECIFIC FINDING THAT THE ESTABLISHED LAW IS INADEQUATE

In a case involving a teachers' strike, a Superior Court fined an education association $1,000 for violating a temporary injunction. Although a statute limited the fine to $100, the Superior Court claimed authority to impose the higher amount as an exercise of its inherent power to punish for contempt. Although the Supreme Court reaffirmed the existence of an inherent power to punish for contempt, it nevertheless reversed the $1,000 fine, reasoning that the Superior Court must abide by statutory limits if those limits

do not "diminish [the power] so as to render it ineffectual." Mead School Dist. No. 354 v. Mead Ed. Ass'n, 85 Wn.2d 278, 287, 534 P.2d 561, 567 (1975).

Likewise, in a group of consolidated juvenile status offense cases, this court held that "inherent contempt powers are appropriately exercised only when the powers conferred by statute are demonstrably inadequate." In re M.B., 101 Wn. App. 425, 451, 3 P.3d 780, 795 (2000).

In the case presently under review, the homeowners claim that the Superior Court had inherent power to impose a sanction against the contractor despite its manifest compliance with a local court rule governing the time within which a settled case must be formally dismissed.

Although the two cited cases involve statutes and the present case a local court rule, this appears to be a distinction without a difference. A local court rule is enacted by the majority vote of Superior Court judges within a particular county. CR 83. The procedure established by LCR 41(e)(3) has been in existence for at least 20 years. [1997] 2 Wash. Rules of Court Annot. 227 (adoption and amendment history). An individual King County Superior Court judge should not be granted the authority to disregard a local rule, particularly a rule this well established, without first making a finding that the rule is inadequate for

demonstrated reasons. The record before this court contains no assertion and no evidence that the homeowners would be prejudiced in any respect by enforcement of the 45-day deadline contained in LCR 41(e)(3), which their attorney ratified when he signed the Notice of Settlement.

4. DECISIONS REGARDING THE ENFORCEMENT OF AN ACCORD ARE SUBJECT TO REVIEW AS IF THEY WERE SUMMARY JUDGMENTS

Although Washington decisions do usually hold that sanctions are reviewable under an abuse-of-discretion standard, none of those cases, it appears, considers the issue of sanctions in the context of an accord.

It is now well established that decisions regarding the enforcement of accords are subject to appellate review under the same standard as summary judgments. Condon v. Condon, 177 Wn.2d 150, 161–62, 298 P.3d 86, 90 (2013); Brinkerhoff v. Campbell, 99 Wn. App. 692, 695–97, 994 P.2d 911, 914–15 (2000). There is no reason why this standard of review should not also apply to the case presently under review, particularly where the homeowners failed to cite any authority to the Superior Court, much less any briefing on the issue of implied power.

This court should consider the stipulation made in open court, the Notice of Settlement, and the declarations submitted for and against the request for attorney's fees. It should then decide, as a matter of law, that the homeowners are without lawful entitlement to the fees they were awarded. Remanding this case to the Superior Court would not be appropriate. The record is sufficiently developed, and the material facts are not in dispute. The issue is ripe for disposition as a matter of law.

The standard of review should not, in any event, make a difference in the outcome of this appeal. It cannot be disputed that the Superior Court did disregard the deadlines established by LCR 41(e)(3). This constitutes an abuse of discretion under the "contrary to law" standard. *See* TJ Landco, LLC v. Harley C. Douglass, Inc., 186 Wn. App. 249, 260, 346 P.3d 777, 783 (2015).

5. RULE 11 SANCTIONS SHOULD BE IMPOSED GIVEN THE LACK OF ADEQUATE BRIEFING AND OTHER MISCONDUCT

The contractor specifically informed the Superior Court that the request for attorney's fees was frivolous. (CP 184) The court therefore had notice of the contractor's opinion with respect to CR 11. It would have been an idle

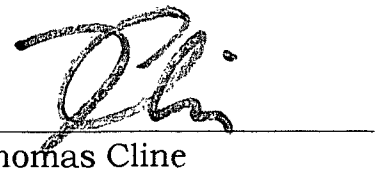
act and otherwise improper for the contractor to file a motion for relief under CR 11 after the court ruled in favor of the homeowners. The proper procedure was to do what the contractor has actually done, that is, raise the issue with the appellate court and request appropriate relief during the disposition of this appeal.

If the homeowners had simply moved for dismissal, without a request for attorney's fees, this case would long ago have been concluded. When they made their request for fees without citing authority just a few weeks after surrendering their counterclaims and paying a large settlement, there is sufficient evidence to support a finding that the fee request was motivated simply by spite. The spitefulness continues unabated. In their brief the homeowners took a colloquy out of context in an attempt to cast your author in a false light. They wanted to make your author appear irresponsible, but omitted a discussion regarding a last-minute change of judges and a directive from the previous judge's bailiff to appear for trial on the very day that the contractor and its counsel did in fact appear, on time and ready to proceed. *Compare* Brief of Respondents 6 *with* Respondents' RP 3. This entire nexus of misconduct should be corrected by an appropriate imposition of sanctions.

CONCLUSION

The contractor respectfully requests that the Court of Appeals reverse the award of attorney's fees entered by the Superior Court in favor of the homeowners and grant to the contractor a right to apply for appropriate relief under authority of Superior Court Civil Rule 11 and the procedure established by Rule of Appellate Procedure 18.1.

DATED this 9th day of September 2016.



Thomas Cline
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King County

LCR 41. Dismissal of Actions
Local Civil Rule

(b) *Involuntary Dismissal.*

(2) Dismissal on Clerk's Motion.

(A) Failure to Appear for Trial. If the court has not been previously notified that the trial is no longer necessary, an order of dismissal will be entered on the date the trial is to be commenced. If the court has been notified that the trial is no longer necessary and the case has not been disposed of within 45 days after the scheduled trial date, the case will be dismissed without prejudice on the clerk's motion without prior notice to the parties, unless the parties have filed a certificate of settlement as provided in LCR 41(e)(3). The clerk will mail all parties or their attorneys of record a copy of the order of dismissal.

(B) Failure to File Final Order on Settlement. If an order disposing of all claims against all parties is not entered within 45 days after a written notice of settlement is filed, and if a certificate of settlement without dismissal is not filed as provided in section (e)(3) below, the clerk shall notify the parties that the case will be dismissed by the court. If a party makes a written application to the court within 14 days of the issuance of the notice showing good cause why the case should not be dismissed, the court may order that the case may be continued for an additional period of time. If an order disposing of all claims against all parties is not entered during that additional period of time, the clerk shall enter an order of dismissal without prejudice.

(C) Failure to File Final Orders after a Certificate of Settlement Without Dismissal is Filed. If an order disposing of all claims against all parties is not entered by the date the parties agreed to in the certificate of settlement without dismissal, the clerk shall notify the parties that the case will be dismissed without prejudice. If a party makes a written application to the court within 21 days of the issuance of the notice showing good cause why the case should not be dismissed, the court may order that the case be continued for an additional period of time. If an order disposing all claims against all parties is not entered during that additional period of time, the clerk shall enter an order of dismissal without prejudice.

(D) Failure to File Judgment or Appeal Following an Arbitration Award. At least 45 days after an arbitration award, the Court may, upon notice to parties, enter an order of dismissal without prejudice for failure to file a judgment or appeal following an arbitration award.

(E) Lack of Action of Record. The Court may enter an order of dismissal without prejudice for failure to take action of record during the past 12 months. The clerk shall issue notice to the attorneys of record that such case will be dismissed by the court unless within 45 days following such issuance a status report is filed with the court indicating the reason for inactivity and projecting future actions and a case completion date. If such status report is not received or if the status is disapproved by the court, the case shall be dismissed without prejudice.

(F) Failure to Return from Stay. If after 90 days beyond the review date no renewing stay order has been filed and there are no future hearing dates, the case shall be dismissed without prejudice by the court for want of prosecution upon further notice to the parties.

(G) Failure to complete an Unlawful Detainer. If no action of record is taken for 45

days, and no future hearing date is scheduled, then the case may be administratively closed by the clerk.

(c) ***Dismissal of Counterclaim, Cross-Claim, or Third Party Claim.*** No local rule.

(d) ***Costs of Previously Dismissed Action.*** No local rule.

(e) ***Notice of Settlements.***

(1) Advising the Court of Settlement. After any settlement that fully resolves all claims against all parties, the parties shall, within five days or before the next scheduled court hearing, whichever is sooner, file and serve a written notice of settlement. If the case is assigned to an individual judge and such written notice cannot be filed with the clerk before the trial date, the assigned judge shall be notified of the settlement by telephone, or orally in open court, to be confirmed by filing and serving the written notice or certificate of settlement within five days.

(2) Notice of Settlement with Prompt Dismissal. If the action is to be dismissed within 45 days, the notice of settlement shall be in substantially the following form:

NOTICE OF SETTLEMENT OF ALL CLAIMS AGAINST ALL PARTIES

Notice is hereby given that all claims against all parties in this action have been resolved. Any trials or other hearings in this matter may be stricken from the court calendar. This notice is being filed with the consent of all parties.

If an order dismissing all claims against all parties is not entered within 45 days after the written notice of settlement is filed, or within 45 days after the scheduled trial date, whichever is earlier, and if a certificate of settlement without dismissal is not filed as provided in LCR 41(e)(3), the case may be dismissed on the clerk's motion pursuant to LCR 41(b)(2)(B).

_____ _____

Date Attorney for Defendant

_____

WSBA No.

_____ _____

Date Attorney for Plaintiff

_____

WSBA No.

(Signatures by attorneys on behalf of all parties.)

(3) Settlement With Delayed Dismissal. If the parties have reached a settlement fully resolving all claims against all parties, but wish to delay dismissal beyond the period set forth in section (e)(2) above, the parties may file a certificate of settlement without dismissal in substantially the following form (or as amended by the court):

CERTIFICATE OF SETTLEMENT

WITHOUT DISMISSAL

I. BASIS

1.1 Within 30 days of filing of the Notice of Settlement of All Claims required by King County Local Rule 41(e), the parties to the action may file a Certificate of Settlement Without Dismissal with the Clerk of the Superior Court.

II. CERTIFICATE

2.1 The undersigned counsel for all parties certify that all claims have been resolved by the parties. The resolution has been reduced to writing and signed by every party and every attorney. Solely for the purpose of enforcing the settlement agreement, the court is asked not to dismiss this action.

2.2 The original of the settlement agreement is in the custody of:_____

at:_____.

2.3 No further court action shall be permitted except for enforcement of the settlement agreement. The parties contemplate that the final dismissal of this action will be appropriate as of:_____.

Date:_____

III. SIGNATURES

_____	_____
Attorney for Plaintiff(s)/Petitioner	Attorney for Defendant(s)/Respondent
WSBA No._____	WSBA No._____
_____	_____
Attorney of Plaintiff(s)/Petitioner	Attorney for Defendant(s)/Respondent
WSBA No._____	WSBA No._____

IV. NOTICE

The filing of this Certificate of Settlement Without Dismissal with the clerk automatically cancels any pending due dates of the Case Schedule for this action, including the scheduled trial date.

On or after the date indicated by the parties as appropriate for final dismissal, if the parties do not dismiss their case, the clerk will notify the parties that the case will be dismissed by the court for want of prosecution unless within 14 days after the issuance a party makes a written application to the court, showing good cause why the case should not be dismissed.

Official Comment

1. Notice of Settlement. Subsections (b)(2) and (e)(1) are intended to prevent a case from

entering a state of suspended animation after the parties reach a settlement. The rule creates a mechanism for a settled case to be formally closed by judgment or dismissal. A case will not be removed from the trial calendar on the basis of a settlement unless the settlement resolves all claims against all parties.

[Adopted effective September 1, 1993; amended effective September 1, 1994; September 1, 1996; September 1, 2001; September 1, 2002; September 1, 2004; September 1, 2006; September 1, 2008; September 1, 2011; September 2, 2014.]

Last Updated December 31, 2015